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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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+ **CS (OS) 2433/2015**

PRAGATI PAPERS INDUSTRIES LTD ..... Plaintiff
Through: Mr. Vivek Sharma with Ms. Mamta Gautam, Advocates.

versus

ALOK NANDA & ANR ..... Defendants
Through: None.

CORAM: JUSTICE S.MURALIDHAR

<u>O R D E R</u>
% **16.08.2016**

1. This is a suit under Order XXXVII of the Code of Civil Procedure 1908 (CPC) for recovery of a sum of Rs. 2,38,97,808/- with pendente lite and future interest on the basis of an Agreement to sell dated 23rd October 2012 executed between the Plaintiff and Defendant No. 1.

2. It is stated that the Defendant No. 1 is a civil works contractor engaged in turnkey projects involving residential properties, through his Sole Proprietorship concern, under the name and style of Immarat Constructions. Defendant No. 2 is stated to be the owner of a plot of land bearing No. 98, Block A, admeasuring 300 square yards at Wazirpur Residential Scheme, presently known as Ashok Vihar, Phase - II, Delhi-110052.

3. The Plaintiff states that some time in the second week of October 2012, Defendant No. 1 approached the Plaintiff. He is stated to have represented to the Plaintiff that Defendant No. 1 was in negotiation with the Defendant No.

2 for entering into an Agreement whereunder Defendant No. 1 would collaborate with Defendant No. 2 for the construction of a new bungalow consisting of a basement and three floors on the land out of the funds of Defendant No. 1 himself or funds arranged by him and additionally pay a sum of Rs. 1.3 Crores to Defendant No. 2. In consideration thereof, Defendant No. 2 would relinquish all his rights and interest in the second floor of the property in favour of Defendant No. 1 or his nominee. Defendant No. 1 requested the Plaintiff to advance, in the first instance, a sum of Rs. 1.25 Crore to be invested into the construction of the subject property, in lieu of promised return on the investment (in the manner specified hereinafter) along with the option of a first right of purchase of the second floor of the new bungalow to be constructed upon the subject property.

4. Defendant No. 1 thereafter entered into an Owner-Builder Collaboration Agreement dated 22nd October 2012 with the Defendant No. 2, under which the Defendant No. 1 undertook the construction of a new bungalow on the subject land consisting of a basement, lower ground floor/ Stilt Parking, upper ground floor, first floor, second floor and third floor. The salient features of the said Agreement were:

(i) Defendant No. 1 was to construct the new bungalow with his 'own funds'.

(ii) During the period of construction, the Defendant No. 1 would be considered as a licencee.

(iii) The work would be completed within a period of 15 months from date of the agreement.

(iv) Defendant No. 1 was permitted to extend the period for completion of the works with the consent of Defendant No. 2 but in no case beyond 18 months from the date of the agreement.

(v) Works to be insured for a sum of Rs. 2.3 Crores.

(vi) Defendant No. 1 would pay to Defendant No. 2, liquidated damages equal to monthly rent for alternative accommodation, in case of delay in completion of works.

(vii) Mutual and reciprocal indemnity between Defendant No. 1 and the Defendant No. 2 (Clause 20 of the Agreement.) The Defendant No. 1 agreed to pay Rs. 1.3 Crores to the said Defendant No. 2, in consideration of the Defendant No. 2 relinquishing the second floor of the new bungalow to be constructed on the subject land including parking space for two cars along with 25% undivided share in common areas in favour of Defendant No. 1 or his attorney or nominee.

5. Defendant No. 1 thereafter entered into an Agreement to Sell dated 23rd October 2012 with the Plaintiff upon the following terms and conditions :

(i) The second floor of the new bungalow to be constructed on the subject land was agreed to be sold by the Defendant No. 1 to the Plaintiff for a total consideration of Rs. 3.8 crores. Of this Rs. 1.25 Crores was paid by the Plaintiff to the Defendant No. 1 at the time of entering into the Agreement to Sell. This payment was made by the Plaintiff to the Defendant No. 1 through RTGS from the Plaintiff's Bank Account as under:

(a) Rs. 10 lakhs through RTGS from the Plaintiff's Bank, HDFC, Patel Nagar Branch, to the bank account of the Defendant No. 1 with Punjab National Bank, Gujranwala Town, Delhi-110009 on 22nd October 2012

(b) Rs. 1.15 crores through RTGS from the Plaintiff's Bank, HDFC, Patel Nagar Branch, to the bank account of Defendant No. 1 with Punjab National Bank, Gujranwala Town, Delhi-110009 on 23rd October 2012

(ii) The Plaintiff further agreed to pay Defendant No. 1, two further instalments of Rs. 25 lakhs each upon the laying of the roof slab of first floor and third floor respectively.

(iii) As per Clause 2 of the Agreement to sell, the second Floor in the new bungalow to be constructed on the subject land was on "buy back basis". After a period of 450 days/15 months counted from the date of the agreement i.e. 23rd October 2012, Defendant No. 1 was required to 'buy back' the rights in the said floor at a premium calculated @24% p.a. (The said period of 15 months/ 450 days was to expire on 24th January 2014, counting 15 calendar months or on 16th January 2014 counting 450 days.)

(iv) Defendant No. 1, in order to secure the amount invested by the Plaintiff and amount payable towards incentive, issued various cheques towards discharge of his liability to the Plaintiff, with the following details with the clear understanding that they shall be presented for payment upon their respective due dates in case the construction of the second floor is not completed by the expiry of the above stated period:

(a) Cheque No. 430657 dated 21st January 2014 for Rs. 10 lacs
(b) Cheque No. 430661 dated 22nd January 2014 for Rs. 60 Lacs
(c) Cheque No. 430662 dated 21st January 2014 for Rs. 55 Lacs
(d) Cheque No. 430663 dated 22nd January 2014 for Rs. 37.5 Lacs

While the cheques at (a) to (c) were towards the principal amount, the cheque at (d) was towards incentives.

(v) Under Clause 5 of the Agreement to Sell, it was implicitly understood that Defendant No. 1 may, with the knowledge, consent and prior approval of the Plaintiff, enter into an Agreement to Sell in respect of the second floor with another party. It was however the intention of the parties that Defendant No. 1 could do so, and the Plaintiff would grant approval for the same, only upon and subsequent to Defendant No. 1 having repaid to the Plaintiff the principal amount invested by the Plaintiff along with the agreed incentives.

(vi) Defendant No. 1, with the concurrence of the Defendant No. 2 and with a view to assure and reassure the Plaintiff, categorically and unequivocally, that there would be no default in the repayment of the amount invested along with the agreed incentive, deposited the original 'Owner Builder Collaboration Agreement' dated 22nd October 2012 with the Plaintiff.

6. The Plaintiff made two further payments of Rs. 25 lakhs each from its bank account through RTGS to the bank account of Defendant No. 1 with Punjab National Bank, Gujranwala Town, Delhi on 23rd May 2013 and 24th December 2013. Defendant No. 1, towards the promised repayment of the additional sums of Rs. 25 lakhs each and the incentive payable upon the further amount so invested by the Plaintiff, issued the following three cheques with the following details with the clear understanding that they shall be presented for payment upon their respective due dates in case construction of the new bungalow is not completed by the expiry of the agreed period:

(a) Cheque No. 652384 dated 22.01.2014 for Rs. 25 lakhs against principal
(b) Cheque No. 981722 dated 24.01.2014 for Rs. 25 lakhs against principal
(c) Cheque No. 652385 dated 22.01.2014 for Rs. 4 lakhs against incentive

7. The Plaintiff wrote an e-mail dated 16th January 2014 reminding Defendant No. 1 of his commitment to pay back the money advanced along with the incentive by the agreed date and informed Defendant No. 1 that the Plaintiff would deposit the cheques in its bank account on the respective due dates (ranging from 21st January to 24th January 2014) and called upon Defendant No. 1 to ensure that there were sufficient funds in his bank account so that the cheques were duly honoured upon presentation.

8. Defendant No. 1, on the same date, viz. 16th January 2014 wrote back to the Plaintiff by email dated 16th January 2014 seeking an extension of eight to ten months for making repayment on account of 'sluggish market conditions'. Defendant No. 1 made the following request:

> "In the matter cited above, we would like to draw your attention towards the sluggish market conditions and the property, in which we put your money invested is yet to find a buyer, \n\\\c\\ we expect to get in another Eight to Ten months, upon whose sale, we would be able to get the substantial amount released and we would be better placed then to pay you back the principal along with the further accrual of incentive.
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> Hence your good self is requested to grant us an extension of another Eight to Ten months and oblige."

9. Defendant No. 1 further wrote letter dated 23.01.2014 in which he repeated the contents of his earlier email dated 16th January 2014 and asked for extension of time by a period of ten months (counted from the date of the letter), i.e. till 23rd November 2014. The reason for the delay was that despite his "best efforts" the building is "yet not completed and is under construction" as opposed to the position stated in the email of 16th January 2014 that the property was yet to find a suitable buyer on account of "sluggish market conditions".

10. According to the Plaintiff, Defendant No. 1 further attempted to mislead the Plaintiff by offering to pay incentive for the further extended period amounting to Rs. 35 lacs by a post dated cheque dated 24th November 2014. Defendant No. 1, without any concurrence from the Plaintiff, further proposed to issue five fresh cheques dated 21st, 22nd November 2014 (three cheques) and 24th November 2014 aggregating to Rs. 1.75 Crores to replace

the cheques issued earlier towards the principal amount financed by the Plaintiff.

11. The Plaintiff states that Defendant No. 1 contacted the Plaintiff over telephone on 22nd January 2014 and put the above proposal to the Plaintiff verbally, but which was immediately turned down by the Plaintiff as unacceptable. Defendant No. 1 thereafter, nevertheless sent out the communication dated 23rd January 2014 to the Plaintiff containing the above proposal, and without annexing the cheques mentioned therein.

12. Defendant No. 2 acting in collusion with Defendant No. 1, thereafter issued an undated "Letter of Confirmation" to the Plaintiff, signed on 24th January 2014 stating that he does confirm that upon the completion of the project and handing over of the portions falling to his share by Defendant No. 1, the said Defendant No. 2 shall have no objection in executing the sale deed of the subject second floor in favour of the Plaintiff and that without the consent and personal approval of the Plaintiff, the said Defendant No. 2 shall not execute the sale deed of the said second floor in favour of any other person. Defendant No. 1 is stated to have visited the office of the Plaintiff in the last week of January, 2014 and personally handed over the letter of confirmation dated 24th January 2014 signed by Defendant No. 2 to the Plaintiff.

13. Thereafter the Plaintiff issued a legal notice dated 3rd April 2014 to both Defendant Nos.1 & 2 and also responded to the letter dated 23rd January 2014 of Defendant No. 1 by communicating to both Defendants that the Plaintiff had rejected their suggestion in totality. The Plaintiff insisted upon

adhering to the repayment schedule. The Plaintiff pointed out that it had unrealized valuable rights and interests not only in the second floor of the subject property but in the entire subject property, which needed to be adequately secured. The Plaintiff declined to give consent to Defendant No. 2, either directly or through the Defendant No. 1 acting as the Attorney of Defendant No. 2, from entering into any agreement to sell with respect to the second floor of the subject property till such time that all cheques issued by Defendant No. l to the Plaintiff were duly honoured. Defendant No. 2 was called upon to cease and desist in creating any third party rights in the subject property, not only in the second floor, but also in the basement, lower ground floor, upper ground floor, first floor, and third floor till such time that the liability towards the Plaintiff for repayment of the principal amount and incentive was fully paid and discharged.

14. By the legal notice dated 3rd April 2014, Defendants 1 and 2 were put to notice that the Plaintiff would present for payment cheques aggregating to Rs. 2,12,50,000 issued by Defendant No. 1 to the Plaintiff on or before 17th April 2014 and that Defendant No. 1 was required to ensure that the same were duly honoured upon presentation.

15. The Plaintiff states that no response was received in writing to the legal notice dated 3rd April 2014 from Defendant No. 1, Defendant No. 2 responded to the legal notice by a reply dated 17th April 2014 denying that there was any privity of contract between him and the Plaintiff and to the shock and surprise of the Plaintiff even denied having issued the letter of confirmation dated (executed on) 24th January 2014. On the same date (17.04.2014) the Defendant No. 1 approached the Plaintiff and pressurised

the Plaintiff to grant a further extension by executing an MOU and offered to tender immediate payment of up to date incentive for the period 23rd October 2012 to 24th January 2014 on or before 19th April 2014 by RTGS directly into the bank account of the Plaintiff.

16. Defendant No. 1 thereafter, on 19th April 2014 paid Rs. 41,50,000 on account of incentives for the period 23rd October 2012 to 24th January 2014 after deducting TDS of Rs. 4,15,000/- through transfer of a net sum of Rs. 37,35,500/- by RTGS into the bank account of The Plaintiff maintained with HDFC Bank. Pursuant to further negotiations between the Defendant No. 1 and the Plaintiff, simultaneously, a Memorandum of Understanding dated 19th April 2014 was executed between Defendant No. 1 and the Plaintiff whereby the time for performance under the Agreement to Sell dated 23rd October 2012 was mutually extended by a further period of ten months (counted from the request letter dated 23rd January 2014), i.e., till 23rd November 2014 subject to various terms and conditions contained in the said MOU. In terms of the said MOU dated 19th April, 2014 and in view of the extension in time for the performance under the Agreement, the cheques originally given were replaced by Defendant No. 1 by issuing six cheques of the dates of 21st, 22nd and 24th November 2014 with the earlier cheques issued by Defendant No. 1 being returned to it.

17. It is stated that the extended period as per the MOU expired on 23rd November 2014. The Plaintiff informed Defendant No.1 by letter dated 23rd December 2014 that it would be depositing the cheques issued by the Defendant. It is stated by the Plaintiff that the Defendant sent a malafide reply on 26th December 2014 offering to sell the property and asking the

Plaintiff to get its sale deed registered. The Plaintiff physically inspected the subject property on 28.12.2014 and found the construction to be incomplete and unfinished as on date and therefore did not accept the "offer". The Plaintiff thereafter responded to the letter dated 26th December 2014 by its letter dated 29th December 2014 and conveyed its rejection of the offer. The six cheques when presented for payment by the Plaintiff were dishonoured with the reasons "funds insufficient". Thereafter, besides filing a criminal complaint, the Plaintiff also filed the present suit.

18. This suit was filed as a summary suit under Order XXXVII CPC. However, the Joint Registrar (JR) by an order dated 4th November 2015 held that the suit did not fall within the purview of a summary suit. However, the Court by order dated 2nd March 2016 held to the contrary and allowed OA No. 4 of 2016 by the Plaintiff. Further in the said order, the Court recorded the submission of the Plaintiff that it did not wish to proceed against Defendant No. 2. Thus Defendant No.1 is the sole Defendant as far as the present suit is concerned.

19. Despite service of summons on him on 18th March 2016, Defendant No.1 has not entered appearance and is set *ex parte*.

20. The averments in the plaint and the documents filed by the Plaintiff in support thereof have not been controverted. In the circumstances, the suit against Defendant No.1 is decreed as prayed and Defendant No.1 is directed to pay the Plaintiff a sum of Rs. 2,38,97,808 with *pendente lite* interest @ 18% from the date of filing of the suit till the date of payment , together with costs of Rs. 10,000. The amount shall be paid within four weeks from today.

21. Decree sheet be drawn up accordingly.

S.MURALIDHAR, J

AUGUST 16, 2016
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